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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 691

LIGGETT & MYERS TOBACCO COMPANY,
Petitioner,

v.

ANITA PRITCHARD, ADMINISTRATRIX OF THE ESTATE OF OTTO E. PRITCHARD, Deceased,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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October 22, 1965

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IN THE

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No. ------

LIGGETT & MYERS TOBACCO COMPANY,
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v.

ANITA PRITCHARD, Administratrix of the Estate of OTTO E. PRITCHARD, Deceased,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Liggett & Myers Tobacco Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in this cause on July 26, 1965.

Opinions Below

The opinion of the Court of Appeals is not yet officially reported. It is reproduced in the appendix to this petition (A-1).* The opinion of the District Court is set forth in petitioner's appendix in the Court of Appeals (114b-127b).**

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* The abbreviation "A" refers to the appendix to this petition.

** Petitioner's appendix in the Court of Appeals will be cited by page numbers followed by a "b."

A prior opinion of the Court of Appeals for the Third Circuit which ordered the retrial out of which this cause now arises is officially reported at 295 F. 2d 292 and reproduced in respondent's appendix in the Court of Appeals (26a-48a).*

Jurisdiction

Jurisdiction to review by writ of certiorari the judgment of said Court of Appeals entered July 26, 1965 is invoked under the provisions of 28 U. S. C. A. § 1254(1).

Questions Presented

1. Where no objection was made to the Trial Court's instructions to the jury nor to the special interrogatories on which the issues were submitted to the jury and no additional instructions on the points in issue were requested, can the Court of Appeals reverse a jury verdict and order a new trial on alleged errors in the instructions in the face of the clear and explicit language of Rule 51 of the Federal Rules of Civil Procedure which bars consideration on appeal of alleged errors in instructions unless specific objections with the grounds distinctly stated are made at the trial?

2. If a "plain error" exception is to be engrafted on Rule 51 despite its unambiguous and mandatory language, what are the criteria for the application of such an exception, and is this a proper case for its application?

3. Was there sufficient evidence in the record to require the issue of assumption of risk to be submitted to the jury pursuant to the Seventh Amendment to the Constitution of the United States?

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* Respondent's appendix in the Court of Appeals will be cited herein by page references followed by an "a."

Federal Rule of Civil Procedure and Constitutional Provision Involved

1. Rule 51 of the Federal Rules of Civil Procedure provides in part:

> ". . . No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. . . ."

2. The Seventh Amendment to the Constitution of the United States provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Statement of the Case

Federal jurisdiction is based on diversity of citizenship.

This is an action to recover damages for cancer in one lung of the plaintiff (respondent)* allegedly caused by smoking 30 or more Chesterfield cigarettes daily from 1924 until December 11, 1953, when the affected lung was removed. In his complaint (6a-12a), plaintiff sought recovery on the grounds of negligence (First Count) and of breaches of express and implied warranties (Second Count). The case has been tried twice. The first trial, lasting from

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* To avoid confusion, the parties will be referred to in this petition in the same manner as they were designated in the Trial Court and in the Court of Appeals, i. e., respondent will be referred to as plaintiff and petitioner as defendant.

The plaintiff died March 2, 1963. His death did not result from cancer, and no vestige of cancer was found in him at his death. His wife, as administratrix of his estate, was substituted for him as a party to this cause.

April 1, 1960 to May 4, 1960 (3a), resulted in a directed verdict for the defendant (petitioner). The plaintiff appealed and the Court of Appeals reversed on the ground that the case should be decided by the jury and it directed that the case be submitted on special interrogatories. 295 F. 2d 292, 301 (26a, 46a).

At the second trial, lasting from October 1, 1962 (Tr. 3)* until November 9, 1962 (183a), all issues were submitted to the jury on special interrogatories (176a-177a). Counsel for the plaintiff made no objection to any of them. The special interrogatories and the jury's answers involved here were as follows (184a):**

> 5. "Did the defendant make any express warranties upon which the plaintiff relied and by which he was induced to purchase Chesterfield cigarettes?"
> ANSWER: No.
>
> 7. "Did the plaintiff assume the risk of injury by his smoking of Chesterfield cigarettes?"
> ANSWER: Yes.

Pursuant to the jury's answers to the interrogatories judgment was entered for the defendant (5a).

Prior to the first trial, both parties engaged in extensive discovery. In addition, prior to both trials, extensive pretrial proceedings took place. There were numerous pretrial conferences among counsel and the Trial Court, and pretrial memoranda were filed before both trials (1a-4a).

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* Transcript of second trial filed with this Court will be cited by page numbers preceded by "Tr.".

** The other interrogatories were as follows: (1) "Was the smoking of Chesterfield cigarettes by this plaintiff the cause or one of the causes of cancer in his right lung?" ANSWER: Yes; (2) "Is the defendant chargeable with negligence which was a proximate cause of the plaintiff's injury?" ANSWER: No; (3) "Is the plaintiff chargeable with negligence which contributed in any degree to his injury?" ANSWER: ....; (4) "Did the plaintiff give notice of a breach of warranty within a reasonable time as required by the Sales Act?" ANSWER: Yes; (5) ....; (5a) "If so, did the defendant breach the said warranty?" ANSWER: ....; (6) "Was there a breach of the warranty implied by law as defined in the charge?" ANSWER: No; (7) ....; (8) "If the defendant is liable, what is the total amount of the damages?" ANSWER: $ None. (183a-194a)

The case was carefully and thoroughly prepared by counsel and the Trial Court.

Following the denial of his post-trial motions to amend judgment and for a partial new trial, plaintiff abandoned on appeal all grounds urged in those motions except those relating to liability based on breach of express warranty (A-3). On appeal plaintiff urged only two grounds for reversal: (1) the Trial Court had abused its discretion in failing to grant a new trial on the ground that the verdict on the issue of breach of express warranty was against the weight of the evidence, and (2) it had been error for the Trial Court to submit the issue of assumption of risk to the jury. Plaintiff had not moved for a directed verdict on the issue of assumption of risk nor had he objected to the instructions or interrogatory concerning it.

The Court of Appeals reversed and remanded. The decision below contains two opinions. The majority held that reliance was a necessary element of express warranty despite the curious manner in which the Pennsylvania legislature punctuates its statutes. The Court also held despite Rule 51 that the instructions on express warranty and assumption of risk, to which no objections were made, were plainly erroneous. The charge on express warranty was considered deficient by the majority because it inadequately related the facts to the law with regard to reliance as an element of express warranty (A-12, A-22). The majority also stated it was error for the Trial Court to charge that the jury must find the defendant intended to be bound by its statements in order to find an express warranty (A-12). The entire court held that, while assumption of the risk is a defense to both negligence and express warranty, contributory negligence was a defense only to negligence. The charge on assumption of risk was found deficient because it failed adequately to distinguish the two concepts as they applied to the case (A-10). The entire court also held the Trial Court erred in even submitting the issue of assumption of risk to the jury on the ground that there was insufficient evidence.

The facts relevant to the issues sought to be raised by this petition are briefly as follows:

Express Warranty

The case was brought and tried throughout on the theory that to recover for breach of an express warranty plaintiff had to prove that he had relied on a warranty in purchasing and smoking the defendant's cigarettes (23a, Tr. 3027). Plaintiff shifted ground on the second appeal and argued reliance was not a necessary element of his case on express warranty. A majority of the Court of Appeals held it was (A-13-22).

Although this was a long trial, most of the evidence dealt with whether or not cigarette smoking was a cause of plaintiff's cancer. The proof concerning express warranty was brief, clear and easy to understand. The only source of express warranty was the defendant's advertising.

The plaintiff testified that he started to smoke cigarettes in 1912; that he smoked cigarettes continuously from 1912 until December 11, 1953; that he was a confirmed smoker before he began to smoke Chesterfields; and that he did not start to smoke Chesterfields until the mid-twenties or 1924 (2b-6b, 8b-10b). The earliest ad introduced by the plaintiff was published in 1928, 12 years *after* the plaintiff started smoking cigarettes and three or four years *after* he allegedly had started to smoke Chesterfields (Pl. Ex. 229, 58a). Plaintiff was shown 27 separate advertisements which had been published by defendant in various newspapers and periodicals. These ads bore publishing dates widely interspersed in a period extending from August 7, 1928 to April 14, 1953. As to each of these ads plaintiff testified that he remembered the ad, that he had read it and that he had relied on it (56a-69a). Plaintiff also testified to watching Arthur Godfrey on television; he remembered hearing Godfrey make certain statements during "commercials" (78a), which commenced in September 1952 (Pl. Ex. 326, 72a).

Plaintiff testified that he was a confirmed smoker before he started to smoke Chesterfields in 1924 (6b); that he did not continue to smoke Chesterfields because of the ads that he may have seen, but because he was a confirmed cigarette smoker (10b); that at the first trial he testified that he had read and relied on an ad which was not published until after the date when he said he stopped smoking, and that therefore he could not have relied upon that ad (10b-15b); that although he testified on deposition that he had read the complaint filed on his behalf, and that everything in the complaint was true and correct, he admitted, when shown the complaint, that the ads attached as exhibits thereto were all published after the date he testified he had stopped smoking and therefore he could not have relied upon these ads as alleged in the complaint (15b-20b); that he smoked Chesterfield cigarettes, rather than some other brand, most of the time after 1924 because he liked their taste (21b); that he did not study any Chesterfield ads but glanced at them only in passing while leafing through a magazine on occasions such as when he was waiting his turn in a barber shop (21b-22b); and that he remembered seeing those ads and he had relied on each of them, even though he only examined them cursorily in the first place and had not seen some of them for as long as 32 years (23b-25b).

Judge Smith of the Court of Appeals stated:

> "... The plaintiff endeavored to prove by his own testimony that the advertisements were an inducement and that in reliance thereon he regularly purchased and smoked Chesterfields. This testimony, when subjected to the test of cross-examination, fell far short of the mark and apparently failed to impress the jury." (A-4).

Assumption of Risk

The defendant's answer specifically pleaded assumption of risk as an affirmative defense to both counts of the plaintiff's complaint as follows (49a): "If there was any

such risk and danger from smoking cigarettes as plaintiff alleges, plaintiff assumed that risk and danger." The plaintiff did not object to the Trial Judge's instructions regarding assumption of risk, or to the submission of any of the interrogatories to the jury, and in his summation discussed the issue (Tr. 2968, 3019).

The jury's affirmative answer to Interrogatory No. 7—that plaintiff had assumed the risk of injury by his smoking of Chesterfield cigarettes (184a)—is amply supported by plaintiff's own testimony. Here, as with express warranty, the evidence was clear. Plaintiff testified that he often heard, beginning before 1915, that cigarettes were "coffin nails," and that when one smoked a cigarette he was, in effect, driving a nail into his coffin; that his mother, who died in 1928, repeatedly advised him to stop smoking because cigarettes were not good "for anybody;" that his wife cautioned him in 1930 that he was smoking too much and that he should reduce his smoking, which he temporarily did; that at various times thereafter when he smoked Chesterfields heavily he would get a bad cough, whereupon his wife would advise him to switch to some other form of smoking, that he would then switch to some other brand of cigarettes or to a pipe for a few days or a month, that his cough would then "ease off," but that he would resume smoking Chesterfields and would repeat the same cycle; that at some unspecified time he heard that smoking cigarettes was bad for the heart; and that about 1945 he heard that inhaling cigarette smoke might or would injure the lungs (6b-8b, 10b, 26b-30b).

Notwithstanding, the plaintiff admittedly always resumed smoking Chesterfields after his cough improved or went away, and continued to smoke Chesterfields until December 11, 1953, the very day that his lung was removed (3b, 10b, 28b-30b). In addition, the history which the plaintiff gave to Dr. Colwell when he first went to see that doctor on October 15, 1953, was that he had been coughing con-

tinually for the past 6 to 8 months, following the "resumption" of smoking cigarettes (Def. Ex. 5, 51b-52b). The implication from this history is that the plaintiff had stopped smoking some time prior to February or April 1953 —because he could not have *resumed* smoking cigarettes unless he had previously stopped smoking them. There is only one logical reason why this plaintiff would have stopped smoking cigarettes, and that was that he believed they were injurious to him.

Reasons for Granting the Writ

I

The Decision of the Court of Appeals Below is Contrary to Holdings of This Court in Similar Situations and is Directly in Conflict With Decisions of the Ninth Circuit Court of Appeals.

Rule 51 of the Federal Rules of Civil Procedure bars consideration on appeal of alleged errors in instructions unless at the trial a party states distinctly the matter to which he objects and the grounds of his objection. Imposing a plain error exception on Rule 51, the Third Circuit Court of Appeals reversed the jury's verdict below for alleged errors in instructions to which the plaintiff made absolutely no objection and which he did not even raise on appeal.

Although this Court has not dealt directly with the question of whether or not there should be a plain error exception to Rule 51, decisions have refused to consider alleged errors in instructions to which no specific objections were made below. This Court has held:

> ". . . Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge is correct, he may not through a general exception obtain a new trial." *Palmer* v. *Hoffman*, 318 U. S. 109, 119 (1943)

In the instant case there was not even a general exception to the charge. Hence, in accord with the *Palmer* case and *Weade* v. *Dichmann, Wright & Pugh Inc.*, 337 U. S. 801, 808 (1949), there was no occasion for invoking any exception to the clear language of Rule 51. This case presents no reasons for departing from the holdings of these cases.

The Ninth Circuit Court of Appeals has consistently refused to recognize any exception to Rule 51. *Woodworkers Tool Works* v. *Byrne*, 191 F. 2d 667 (9th Cir. 1951). Its position was very clearly stated in *Bertrand* v. *Southern Pac. Co.* 282 F. 2d 569, 572 (9th Cir. 1960), *cert. denied*, 365 U. S. 816 (1961).

> "Whatever the rule may be elsewhere, in this Circuit the 'plain error' rule may not be utilized in civil appeals to obtain review of instructions given or refused, where the ground asserted was not raised in the trial court."

See also, *Rudick* v. *Prineville Memorial Hosp.*, 319 F. 2d 764, 770 (9th Cir. 1963); *Crespo* v. *Fireman's Fund Indem. Co.*, 318 F. 2d 174, 175 (9th Cir. 1963); *Hargrave* v. *Wellman*, 276 F. 2d 948, 950 (9th Cir. 1960); *Siebrand* v. *Gossnell*, 234 F. 2d 81, 96, n. 8a (9th Cir. 1956); *Persons* v. *Gerlinger Carrier Co.*, 227 F. 2d 337, 342-343 (9th Cir. 1955).*

The Seventh Circuit does not appear to have made any statement concerning the application of plain error when there is a failure to comply with the requirements of Rule 51. The Courts of Appeals for the First and Eighth Circuits have discussed a plain error exception which may, under certain circumstances, mitigate the effect of Rule 51,

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* The recent Ninth Circuit case of *Standard Oil Co. of Calif.* v. *Perkins*, 347 F. 2d 379, 389 (9th Cir. 1965) mentions plain error and Rule 51. However, it was a passing reference since the court found no error. Surely, the Ninth Circuit would not depart from such a long held and well reasoned position in such a cavalier manner. It appears from the opinion that the alleged error in the charge was of little importance and the issue of plain error not seriously considered.

Giacalone v. *Raytheon Mfg. Co.*, 222 F. 2d 249 (1st Cir. 1955); *Massachusetts Bonding & Ins. Co. v. Ray Dilschneider, Inc.*, 203 F. 2d 556 (8th Cir. 1953), but no case has been found in which this exception was actually invoked by either of these courts. Other Circuits have invoked a plain error exception,* but the statement of it has been inconsistent and confusing among and within Circuits.**

II

The Questions Raise Important Issues in the Interpretation and Application of Rule 51 of the Federal Rules of Civil Procedure Which Require Determination by This Court.

The application of Rule 51 is of great importance to the administration of justice under the Federal Rules of Civil Procedure. It affects every civil case tried before a jury in a Federal court. Recently, the number of appeals in which parties have attempted to raise errors in the charge to which no objections were made have increased substantially. The cases cited in this petition are representative, not exhaustive. Since October 1964 eleven reported decisions in addition to the opinion below have involved attempts to raise on appeal alleged errors in a charge to which no objection was made below. See Appendix B. As discussed below, decisions recognizing a plain error exception to Rule 51 are inconsistent and confusing, not only from one circuit to another but also within

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* *E. g.: Ferrara* v. *Sheraton McAlpin Corp.*, 311 F. 2d 294 (2d Cir. 1962); *Atlantic Coast Line R.R. Co.* v. *Bennett*, 251 F. 2d 934 (4th Cir. 1958); *Wirtz* v. *International Harvester Co.*, 331 F. 2d 462 (5th Cir.), *cert. denied*, 379 U. S. 845 (1964); *Bellak* v. *United Home Life Ins. Co.*, 244 F. 2d 623 (6th Cir. 1957); *Pridgin* v. *Wilkinson*, 296 F. 2d 74 (10th Cir. 1961); *Montgomery* v. *Virginia Stage Lines*, 191 F. 2d 770 (D. C. Cir. 1951).

** See pages 14-15 *infra*.

some circuits. With no uniformity of application or result, litigants have been denied equal treatment in Federal jury trials. Uniform application of Rule 51 in accord with its clear language is based on sound policy, is in accord with decisions of this Court and of the Ninth Circuit and would eliminate the problem of confused and conflicting decisions regarding Rule 51.

A. The decision of the Court below conflicts with both the clear language and the policy of Rule 51.

Rule 51 rests on a sound foundation of public policy: fairness to the Trial Court and opposing counsel by requiring objections to a charge so that any errors may be corrected while there is still opportunity; the importance of avoiding a new trial caused by the neglect or design of the losing party; the public interest in bringing litigation to an end. See *Palmer* v. *Hoffman,* 318 U. S. 109, 119 (1943); *Pruitt* v. *Marshall,* 283 F. 2d 436, 441 (5th Cir. 1960); *Miller* v. *New York Central R. R. Co.,* 239 F. 2d 10, 13 (7th Cir. 1956).

This Court's decision in *United States* v. *Atkinson,* 297 U. S. 157 (1936), decided prior to the Federal Rules of Civil Procedure, stated:

> "*In exceptional circumstances, especially in criminal cases,* appellate courts, in the public interest, may of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." (At page 160) (Emphasis added)

Some cases which invoke a plain error exception to Rule 51 rely on this language. See e. g., *Troupe* v. *Chicago D. & G. Bay Transit Co.,* 234 F. 2d 253 (2d Cir. 1956). However, such a reliance completely ignores the fact that, subsequent to *Atkinson,* this Court promulgated the Federal Rules of

Civil and Criminal Procedure. As suggested in *Atkinson*, Rule 52(b) of the Criminal Rules explicitly states that plain error affecting substantial rights may be considered even if not brought to the attention of the trial court. By contrast, the Civil Rules have no counterpart of Criminal Rule 52(b) and Rule 51 of the Civil Rules explicitly states that errors in instructions may not be considered without distinct objections. If a plain error exception were intended for Rule 51, it would have been explicitly stated.

Reading Rule 51 together with Rule 61 makes even more apparent that the drafters intended to exclude a plain error exception to instructions. Rule 61 provides that harmless error must be disregarded. If a plain error exception applies to Rule 51, it is denuded of all meaning and significance. Rule 51 would then mean only that harmless error to which no objection was made cannot be raised on appeal. Since Rule 61 requires harmless error to be disregarded, Rule 51, if it is to mean anything, requires all errors, harmless or plain, be disregarded in connection with the limited area of instructions, unless objection was made below.*

This Court and the drafters of the Federal Rules of Civil and Criminal Procedure obviously considered the doctrines of plain and harmless error and made specific provisions concerning them. If those provisions are to be changed, it should be done by changes in the rules, not by decisions of Courts of Appeals.**

Decisions of this Court regarding the application of Rule 50(b) of the Civil Rules buttress a strict application of Rule 51. Rule 50(b) provides that, unless motions for

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* We do not contend, of course, that the doctrine of plain error does not apply to Federal Civil Trials. Our position is that in the limited area of instructions, Rule 51 bars such application.

** See, e. g., *Anderson* v. *Yungkau*, 329 U. S. 482 (1947) and the 1963 Amendment to Rule 25(a), Federal Rules of Civil Procedure.

a directed verdict at trial and for judgment n. o. v. after the verdict were made, the sufficiency of the evidence supporting a jury's verdict cannot be raised on appeal. This Court has specifically refused to allow Rule 50(b) to be circumvented. *Globe Liquor Co.* v. *San Roman,* 332 U. S. 571 (1948); *Cone* v. *Virginia Pulp and Paper Co.,* 330 U. S. 212 (1947). The Third Circuit has applied Rule 50(b) inexorably. *Burns* v. *Yanos,* 17 F. R. D. 391 (E. D. Pa. 1955), *aff'd,* 232 F. 2d 929 (3d Cir. 1956); *Gebhart* v. *Wilson F. F. Co.,* 348 F. 2d 129 (3d Cir. 1965). Rule 51 should be enforced according to its plain language as Rule 50(b) is.

B. Those decisions which do apply a plain error exception to Rule 51 are inconsistent and confusing.

There exists no uniform or consistent application of a plain error exception among and within the Circuits which recognize it. Even assuming a plain error exception to Rule 51 is justified, which we deny, it would still be important to grant this petition. This Court should then state what the exception is and when it should be applied to achieve uniformity in all Federal Courts.

Although classification is difficult and somewhat arbitrary, several categories emerge from the variety of opinions which apply a plain error exception to Rule 51.

First are the cases which hold that the exception should be applied to Rule 51 sparingly and only in exceptional circumstances where the error is fundamental and actually resulted in a "gross" or "manifest" miscarriage of justice. *Trent* v. *Atlantic City Elec. Co.,* 334 F. 2d 847 (3d Cir. 1964); *Schabo* v. *County of Mercer,* 333 F. 2d 971 (3d Cir. 1964); *Haugh* v. *Curlee,* 265 F. 2d 130 (5th Cir. 1959); *Callwood* v. *Callwood,* 233 F. 2d 784 (3d Cir. 1958); *Giacalone* v. *Raytheon Mfg. Co.,* 222 F. 2d 249 (1st Cir. 1955); *Hite* v. *Western Md. Ry.,* 217 F. 2d 781 (4th Cir. 1954), *cert. denied* 349 U. S. 960 (1955).

Secondly, a group of cases discusses a plain error exception when a miscarriage of justice or a probable injustice

may have occurred. The opinion of the Third Circuit below falls into this category and is at odds with *Callwood, Schabo* and *Trent* cited above. See also, *McNamara* v. *Dionne,* 298 F. 2d 352 (2d Cir. 1962); *Massachusetts Bonding and Ins. Co.* v. *Dilschneider, Inc.,* 203 F. 2d 556, 560 (8th Cir. 1953); *Montgomery* v. *Virginia Stage Lines,* 191 F. 2d 770, 774 (D. C. Cir. 1951); *Dowell Inc.* v. *Jowers,* 166 F. 2d 214 (5th Cir.), *cert. denied* 334 U. S. 832 (1948), but compare *Haugh* v. *Curlee, supra.*

Finally, some cases hold that where the nature of the error is so fundamental and obvious, the effect of the error is immaterial and a plain error exception may be invoked. These cases either fail to discuss the effect of the error or assume it caused a miscarriage of justice without further consideration. See *Ferrara* v. *Sheraton McAlpin Corp.,* 311 F. 2d 294 (2d Cir. 1962); concurring opinion in *Troupe* v. *Chicago D. & G. Bay Transit Co.,* 234 F. 2d 253 (2d Cir. 1956); *Mondshine* v. *Short,* 196 F. 2d 606 (5th Cir. 1952).

If a plain error exception is to be made to Rule 51, it should be in the terms of the decisions grouped in the first category above—sparingly used and only when there is a fundamental error which resulted in manifest injustice. Otherwise, Rule 51 will be emasculated, the policy underlying it will be completely thwarted and the finality of jury verdicts seriously threatened.*

C. The decision of the Third Circuit is a glaring example of how an erosion of Rule 51 can cause a manifest miscarriage of justice rather than prevent one.

If there ever were a case in which Rule 51 should be enforced, this is it. The complaint was originally filed on

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* Some text writers seriously question the existence of a plain error exception to Rule 51 and state, if one exists, it should be used only in exceptional cases. Wright, *Federal Courts,* § 94, p. 363 (1963); 2B Barron & Holtzoff, *Federal Practice and Procedure,* § 1106, pp. 474-475 (Rules Ed. 1961).

October 30, 1954. Until the first trial started on April 30, 1960 nearly six years later, the parties engaged in extensive discovery. Extensive pretrial procedures took place before both trials (1a-4a). The position of the parties and the issues were carefully and thoroughly delineated. The first trial lasted about five weeks, the second six. The case has been before the Court of Appeals twice. The expenditure of judicial time and effort, as well as the cost to the parties and the courts, has been enormous.

Of paramount importance, plaintiff had his day in court and was afforded a full and fair trial. At the conclusion of the testimony the parties each submitted to the Trial Court proposed special interrogatories for the jury (Tr. 3074-5, 110b). After the Trial Court had charged the jury, it met with counsel in chambers to discuss any objections or additional instructions. Plaintiff not only had no objections,* he withdrew his proposed special interrogatories previously submitted (110b). Plaintiff requested one addition to the instructions which was readily given (177a-178a).

By reversing due to alleged errors never raised by the plaintiff, the Third Circuit completely nullified Rule 51 and its sound policy. It is grossly unfair to the Trial Court and the defendant since they did not have a chance to consider or cure any alleged error at trial. Plaintiff has been able to take his chance on a jury verdict and, being unsuccessful, can now try again because of alleged errors he never raised below. This enormously protracted litigation will lumber on interminably.

The Third Circuit's attempt to justify its decision in part on the ineptness of plaintiff's counsel is a bootstrap operation—erroneous in fact and principle. Plaintiff's attorney has been described by members of the bench and bar as highly experienced and one of the leading trial

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* Since a record reference cannot be given to something that was not done, we can refer only to all that was said by plaintiff's counsel in criticism of the charge (109b, 112b-113b).

lawyers in the country.* No jury verdict will ever be safe if a tactical decision of trial counsel to remain silent and go to the jury can be labelled ineptness and lay the basis for a reversal. Any unsuccessful litigant with twenty-twenty hindsight can point to instances where his counsel might have handled things differently. If such hindsight can be the grounds for reversal, the Courts of Appeals will be required to conduct seminars in trial procedures. It is not unreasonable to hold civil litigants to the same exacting standards as criminal defendants who complain of inept counsel—a showing of such woefully inadequate representation that the trial was "a farce and a mockery of justice." *United States* v. *Garguilo*, 324 F. 2d 795 (2d Cir. 1963).

Furthermore, the Third Circuit's holding that the charge contained errors which were fundamental, highly prejudicial and *may* have caused a miscarriage of justice is clearly erroneous. It faulted the instructions on express warranty and assumption of risk on the grounds: (1) they inadequately related the facts to the law and (2) portions of these instructions were incorrect. We respectfully submit that the Trial Court's instructions adequately related the facts to the law and were entirely correct.

The evidence with regard to express warranty and assumption of the risk was brief, simple and easy for the jury to understand. As summarized above (pp. 6-9) it consisted mainly of the plaintiff's own testimony on direct and cross. With regard to express warranty, the defendant's advertising was the only possible source of express

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* As was observed by Judge Marsh of the Western District of Pennsylvania in *Fratto* v. *Northern Insurance Co. of N. Y.*, 242 F. Supp. 262, 265 (1965): "Attorney [James P.] McArdle [plaintiff's attorney] is a lawyer of some 34 years experience and the senior member of a large and prominent law firm in the City of Pittsburgh." Mr. McArdle was named "Man of the Year in Law" by the Pittsburgh Junior Chamber of Commerce in 1964 (*Pittsburgh Press*, January 10, 1965). On June 23, 1965, the Western Pennsylvania Chapter of the American Trial Lawyers Association named Mr. McArdle "Distinguished Trial Lawyer of the Year." In presenting this award, Attorney Abraham Friedman, past President of the National Academy of Trial Lawyers, proclaimed Mr. McArdle as "America's No. 1 Trial Lawyer" (*Pittsburgh Press*, June 23, 1965).

warranties. On direct, plaintiff testified he relied on them. On cross, it became apparent he did not. With respect to assumption of risk, the plaintiff himself testified he knew smoking Chesterfield cigarettes was not good for him. Counsel for both parties treated this evidence at length in their summations (Tr. 2968, 3019; 103b-106b). Since both parties relied heavily on different portions of the plaintiff's own testimony, it would have been almost impossible for the Trial Court to discuss this evidence without prejudicing one party or the other. The Trial Court commented on the evidence and related it to the legal issues where necessary (154a). In fact, plaintiff's counsel resisted attempts by defendant to have the Trial Court further discuss the evidence, asserting this to be the policy of the Circuit and District Courts (Appendix C). Thus, not only was plaintiff completely satisfied with these instructions, but according to the opinion below, led the Trial Court into error.

The Court of Appeals held the Trial Court erred when it instructed the jury that, to find an express warranty, the jury must also find the seller "actually intended to be bound by his statement." Its authority for this holding, 1 *Williston on Sales* §§ 198-200 (Rev. Ed. 1948) and *Rothermel* v. *Phillips,* 292 Pa. 371, 375-6, 141 Atl. 241 (1928), fail to support it. Williston merely indicates the author's conclusion that the words of the Sales Act should override old decisions. *Rothermel* discusses this contention and then states that a decision on the question was not necessary in that case. Pennsylvania law, binding in this diversity case, clearly supports the language in the charge that a seller must intend to be bound by his statement for there to exist an express warranty. *Michelin Tire Co.* v. *Schulz,* 295 Pa. 140, 145 Atl. 67 (1929); *Walker* v. *Kirk,* 72 Pa. Super. 534 (1919); *M'Farland* v. *Newman,* 9 Watts 55, 34 Am. Dec. 497 (Pa. 1839).

Even if this were error, it was not prejudicial to the plaintiff. After considerable deliberation on all interrogatories the jury requested additional instructions on warranty. The Trial Court set out, once again, the elements of express warranty (179a-180a). This time, however, the language the

Third Circuit found offensive was omitted. Thus, at a time when the jury was actually considering express warranty, the charge given was correct even under the holding of the Third Circuit, which failed to recognize or comment on this supplemental charge on express warranty. The charge taken as a whole together with Interrogatory No. 5 clearly and fairly presented the issue of express warranty to the jury without any prejudice to the plaintiff.

Similarly, there was no error in the charge on assumption of risk. The opinion below states that the Trial Court failed to distinguish between assumption of risk and contributory negligence, the former applicable to express warranty, the latter not. But, a reading of the instructions shows that the Trial Court did distinguish between the concepts of contributory negligence and assumption of risk, carefully labelling each and discussing each separately (168a-169a). And, the Trial Court had to charge on both concepts since at that time a negligence cause to which contributory negligence was a complete defense was being submitted to the jury.

The statement of assumption of risk in the charge is eminently correct under Pennsylvania Law. *Schentzel* v. *Philadelphia Nat'l League Club,* 173 Pa. Super. 179, 96 A. 2d 181 (1953).

According to the Third Circuit the proper rule on assumption of risk is:

> "It is the law of Pennsylvania that a person who voluntarily exposes himself to a danger of which he has knowledge, or has had notice, assumes the attendant risk. He may not recover for personal injuries sustained as the result of the exposure because under the circumstances the person responsible for the danger is relieved of any duty to protect the injured person." (A-9)

The Trial Court instructed the jury:

> "When in the face of an obvious or known danger, a person voluntarily proceeds with a course of conduct which may result in injury, he consents to take his chances and to relieve others of responsibilty." (169a)

We fail to see any difference between the Third Circuit's language and the charge, let alone fundamental and highly prejudicial error.*

Furthermore, if the jury's verdict on express warranty must be upheld, as stated above, the entire issue of assumption of risk is moot. Having found no express warranty on which plaintiff relied, the case is over, and there is nothing to which assumption of risk is related. Since jury verdicts should be affirmed, if at all possible, the jury's negative answer to Interrogatory No. 5 on express warranty renders irrelevant any real or imagined errors connected with Interrogatory No. 7 on assumption of risk.

Finally, there was no miscarriage of justice here. Plaintiff received a fair trial. The jury's verdict was the right one. See *Trent* v. *Atlantic City Elec. Co.*, 334 F. 2d 847 (3d Cir. 1964). The majority below held that plaintiff must prove reliance. As Judge Smith noted, see p. 7 *supra*, his evidence on reliance "fell far short of the mark." Although this alone is sufficient to defeat plaintiff's case, there was more than enough evidence to support the jury's finding of assumption of risk. To reverse the jury's verdict on the grounds assigned by the Third Circuit perpetrates a miscarriage of justice and divests jury verdicts of any semblance of finality. If for no other reason, this petition should be granted in the exercise of this Court's supervisory power over the lower Federal courts. *Gibson* v. *Lockheed Aircraft Serv. Inc.*, 350 U. S. 356, 357 (1956).**

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* To make it unanimous, plaintiff's counsel, in his summation, explained the law of assumption of risk in the same terms as the Trial Court in its instructions (Tr. 3019).

** Mr. Justice Frankfurter, in his concurrence, found no confusion or conflict among the circuits in regard to Rule 51. However, the issue there was whether an objection below was distinctly stated in compliance with Rule 51, not the issue here—whether there is a plain error exception to Rule 51.

III

The Holding of the Third Circuit That There was Insufficient Evidence to Submit the Issue of Assumption of Risk to the Jury Violates the Seventh Amendment.

Having found error in the charge of assumption of risk, the Third Circuit apparently felt it proper to ignore Rule 50(b) which requires motions for a directed verdict and judgment n.o.v., and to consider the sufficiency of the evidence on that point. If the charge were correct, the jury's verdict must stand. Taking the evidence in the light most favorable to defendant, it clearly made out a case for submission to the jury.

The Seventh Amendment prohibits Courts of Appeals from reexamining facts tried by a jury. When the evidence is such that fair-minded men may draw different inferences and reach different conclusions, then the Seventh Amendment requires the case to be submitted to the jury and prohibits interference with that verdict by Courts of Appeals. *Miller* v. *Brazel,* 300 F. 2d 283 (10th Cir. 1962); *United States* v. *Bryan,* 265 F. 2d 698 (5th Cir. 1959); *American Fidelity & Cas. Co.* v. *Drexler,* 220 F. 2d 930 (5th Cir. 1955).

Under these principles, the Court of Appeals had no right to disturb the jury's verdict. Plaintiff's own testimony, summarized, *supra* pp. 7-9, shows that there was sufficient evidence upon which the jury based its verdict.

The Third Circuit did not discuss the evidence supporting the jury's finding. It just stated it was insufficient. It went on to state that defendant's ads in some way overcame this evidence. This was a question for the jury, not an Appellate Court. The jury could have considered the fact that the ads, although strung together in the opinion below, were published separately at widely scattered times from 1928 through 1953 and that plaintiff merely glanced at them. It could also have considered the fact that defendant, no matter how much research it might have carried on, could never have discovered the effect its cigarettes are alleged to have had on this plaintiff. The plaintiff alone knew that cigarettes were not good for him as an individual, but he voluntarily smoked anyway.

If there is to be a third trial, this ruling on the sufficiency of the evidence is clearly fundamental to the further conduct of this case. Unless defendant can find additional evidence, the Trial Court at the third trial may well be constrained to direct a verdict for plaintiff on assumption of risk pursuant to the opinion below. Since the plaintiff is now dead, it will be well nigh impossible to obtain any additional evidence. In effect, the Third Circuit is depriving the defendant of this defense in violation of the Seventh Amendment despite the fact that the Trial Court decided there was sufficient evidence and the jury decided there was a preponderance of evidence that plaintiff assumed the risk. We submit this is an additional reason for granting the petition. *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 685 n. 3 (1949); *Land* v. *Dollar*, 330 U. S. 731, 734 n. 2 (1947); *United States* v. *General Motors Corp.*, 323 U. S. 373, 377 (1945).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 22, 1965

Certificate of Service

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was served by mail this 22nd day of October, 1965 upon James P. McArdle and James E. McLaughlin, McArdle, Harrington, Feeney & McLaughlin, 606 Frick Building, Pittsburgh, Pennsylvania 15219, counsel of record for respondent herein, by depositing the same in a United States mail box at One Rockefeller Plaza, New York, New York 10020, in a wrapper addressed to said counsel as aforesaid with sufficient airmail postage prepaid.

Counsel for Petitioner

Dated: October 22, 1965.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14802

ANITA PRITCHARD, ADMINISTRATRIX OF THE ESTATE OF OTTO E. PRITCHARD, DECEASED,
Appellant,

v.

LIGGETT & MYERS TOBACCO COMPANY,
A CORPORATION,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued—December 8, 1964

Before GANEY, SMITH and FREEDMAN, *Circuit Judges.*

Opinion of the Court

(Filed July 26, 1965)

By SMITH, *Circuit Judge.*

The plaintiff brought this action for personal injury alleging that he contracted lung cancer as a result of having smoked Chesterfield cigarettes for many years. The claims for relief, stated in separate counts of the complaint, alleged negligence and breach of warranty as the bases of liability. The defendant, admittedly the manufacturer of the cigarettes, denied the allegations of the complaint and pleaded assumption of risk as an affirmative defense to

each of the claims. The jurisdiction of the court below was invoked on the ground of diversity of citizenship and therefore under the facts of the case the law of Pennsylvania was applicable.

The action was heretofore before this Court on an appeal from a judgment entered on a directed verdict in favor of the defendant, 295 F. 2d 292. The judgment was reversed and a new trial was granted pursuant to the mandate. The present appeal is from a judgment entered on a jury verdict in favor of the defendant. The earlier opinion of this Court contains a comprehensive summary of the pertinent evidence offered in the first trial. Since the evidence offered at the second trial did not differ substantially, we find it necessary to set forth herein only such additional facts as may be relevant to the narrow issues raised on this appeal.

The plaintiff, who was 63 years old at the time of the second trial, admittedly smoked cigarettes since he was 15 years of age. He was an habitual cigarette smoker for several years prior to 1924, when he began smoking Chesterfields for the first time. Thereafter, and during the critical period, between sometime in 1924 and the latter part of 1953, he smoked Chesterfields regularly, consuming "at least a carton" per week. There was ample evidence in the record from which the jury could have found, as it did, that the smoking of Chesterfields was a cause of the lung cancer, which was diagnosed and removed in 1953. This finding is not an issue on this appeal.

The alleged warranties were contained in a series of advertisements published periodically in both newspapers and magazines. These advertisements featured in bold type such factual affirmations as the following: "Chesterfields Are Best For You"; "Chesterfields Are As Pure As The Water You Drink And The Food You Eat"; "A Good Cigarette Can Cause No Ills"; "Nose, Throat And Accessory Organs Not Adversely Affected By Smoking Chesterfields"; "Play Safe Smoke Chesterfields." (See also the

earlier opinion of this Court). Many of the advertisements contained assurances that the affirmations were based upon extensive research and the opinions of medical specialists. There was implicit in these assurances a strong suggestion that while other brands of cigarettes might be harmful, Chesterfields were not.

This Court stated in its earlier opinion: "The evidence compellingly points to an express warranty, for the defendant, by means of various advertising media, not only repeatedly assured plaintiff that smoking Chesterfields was absolutely harmless, but in addition the jury could very well have concluded that there were express assurances of no harmful effect on the lungs."

The issues were submitted to the jury on a series of special interrogatories, Fed. Rules Civ. Proc., rule 49(a), 28 U.S.C.A., all of which, except one, were answered adversely to the plaintiff. The jury found: (1) the smoking of Chesterfield cigarettes by the plaintiff was "the cause, or one of the causes," of the cancer; (2) the defendant was not chargeable with negligence; (3) the defendant made no "express warranties upon which the plaintiff relied and by which he was induced to purchase" the cigarettes; and (4) the plaintiff assumed the risk of injury by his smoking the cigarettes. A judgment for the defendant in accord with the special findings was entered.

The plaintiff moved for a new trial on the grounds, among others, that the verdict on the breach of warranty issue was against the weight of the evidence, and the Court's instructions to the jury on the same issue were erroneous. The motion was denied. The only grounds here urged as a basis for reversal are those relating to the breach of warranty issue; the others have been abandoned.

Denial of Motion for New Trial.

The plaintiff argues that the verdict was against the weight of the evidence and that the denial of his motion

for a new trial, based on this ground, was error. It is well settled that a motion for a new trial on the ground herein urged is addressed to the sound discretion of the trial judge and its denial is not ordinarily reviewable on appeal. *Silverii* v. *Kramer*, 314 F. 2d 407, 413 (3rd Cir. 1963); *Lind* v. *Schenley Industries, Inc.*, 278 F. 2d 79, 89 (3rd Cir. 1960), cert. den. 364 U. S. 835; *Magee* v. *General Motors Corp.*, 213 F. 2d 899 (3rd Cir. 1954). Since the judgment must be reversed on other grounds, we see no need to discuss the merits of the argument.

Reliance as Requisite to Right of Action

The breach of warranty issue was tried on the assumption that reliance of the purchaser was an essential element of an express warranty as defined by statute, infra, and therefore requisite to a cause of action for its breach. The plaintiff endeavored to prove by his own testimony that the advertisements were an inducement and that in reliance thereon he regularly purchased and smoked Chesterfields. This testimony, when subjected to the test of cross-examination, fell far short of the mark and apparently failed to impress the jury.

The Court instructed the jury, consistently with the foregoing assumption, as follows: "The law of Pennsylvania provides that any affirmation of fact, or any promise by the seller relating to the goods, is an express warranty if the natural tendency of such an affirmation or promise is to induce the buyer to purchase the goods, *and if the buyer purchases relying thereon.*" (Emphasis supplied).

These instructions were undoubtedly consonant with the majority rule which is predicated on a construction of Section 12 of the Uniform Sales Act,[1] as adopted by many

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[1] "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, *and if the buyer purchases the goods relying thereon.* No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only, shall be construed as a warranty." (Emphasis supplied.)

of the States. *Pedroli* v. *Russell,* 320 P. 2d 873 (Cal. 1958); *Rogers* v. *Toni Home Permanent Co.,* 147 N.E. 2d 612 (Ohio 1958); *Frank* v. *Salomon,* 34 N.E. 2d 424 (Ill. 1941); see also text and Annotations, Frumer and Friedman, *Products Liability,* Vol. 1, § 16.04[4]. However, under the law of Pennsylvania the rule is not applicable where the factual affirmations run to the public and their natural tendency is to induce a purchase.

The applicable section of The Sales Act of Pennsylvania, 69 P. S. § 121, reads as follows:[2]

> "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and *if the buyer purchases the goods relying thereon* no affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only, shall be construed as a warranty." (Emphasis supplied).

The quoted version differs from that which appears in The Uniform Sales Act.

It will be noted that in Section 12 of The Uniform Sales Act the conditional phrase "and if the buyer purchases the goods relying thereon," at the end of which a period appears, modifies the antecedent clause. In the version hereinabove quoted the same phrase, at the end of which no punctuation appears, introduces a proviso creating an exception to the general definition appearing in the first clause. While punctuation is seldom a reliable guide to statutory construction it is a relevant factor where, as here, its effect is to change the import of the statute. The materiality of the change is a significant indication that it was the intent of the Pennsylvania legislature not to follow Section 12 of The Uniform Sales Act as written.

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[2] Superseded by Uniform Commercial Code, § 2-313, adopted April 6, 1953.

An express warranty, within the meaning of the Pennsylvania statute, as we construe it, is any factual affirmation or promise, the natural tendency of which "is to induce the buyer to purchase the goods." Reliance of the buyer is not a requisite of either the warranty or a right of action for its breach. It follows that the instructions given were erroneous, as was the submission to the jury of the issue of reliance. Under the facts of this case the issue of reliance was wholly irrelevant; the only issue was whether the factual affirmations contained in the many advertisements were such as would naturally tend "to induce the buyer to purchase the goods."

This Court was called upon to construe the statute in the case of *Mannsz* v. *Macwhyte Co.*, 155 F. 2d 445 (1946). Therein the respective claims for damages, one for wrongful death and another for personal injury, were predicated upon the alleged breach of an express warranty contained in a manual circulated by the manufacturer. The plaintiffs attempted to prove that the purchase of a wire rope, which broke while being used to support a scaffold, was purchased in reliance on certain representations as to strength contained in the manual. They failed in this proof; in fact, there was no evidence in the record that the manual ever came to the attention of either the purchaser, who died in the accident, or his injured employee.

This Court held that where the factual representations run to the public and are such as would naturally induce a purchase neither privity of contract nor actual reliance on the representations is an essential element of a right of action under the statute. Accord *Worley* v. *Proctor & Gamble Mfg. Co.*, 253 S. W. 2d 532 (Mo. 1952); see also *Williston on Sales,* Vol. 1, §§ 206 and 208; Frumer and Friedman, *Products Liability,* supra. If a manufacturer extends to the public an express warranty that his product is harmless and thereafter a purchaser suffers personal injury as a result of its breach, the manufacturer cannot disclaim liability on the ground that there was no reliance

on the warranty. The express warranty is an integral part of the contract of sale and may not be disaffirmed, after a breach has occurred, on the ground that the purchaser did not actually rely on it.

In the *Mannsz* case, supra, this Court sustained a judgment in favor of the defendant but on the ground that the wire rope had been used for a purpose not intended by the manufacturer and this misuse placed it beyond the scope of warranty.

Assumption of Risk as Defense

An action for personal injury based upon the breach of an express warranty, although it sounds also in tort, is in substance one for breach of contract. The availability of assumption of risk as a defense in such an action depends upon which of two concepts is adopted. The distinction may be of little importance in an action for personal injury based on negligence but it is important where, as here, an additional basis of liability is the alleged breach of an express warranty. See *Koshorek* v. *Pennsylvania Railroad Company,* 318 F. 2d 364, 367 (3rd Cir. 1963).

Assumption of risk in its secondary sense is ordinarily synonymous with contributory negligence and involves a failure to exercise reasonable care for one's own safety. Under this concept recovery is barred because of the plaintiff's departure from the standard of reasonable conduct and notwithstanding the misconduct of the defendant. *Potter* v. *Brittan,* 286 F. 2d 521 (3rd Cir. 1961) and cases hereinafter cited. Harper and James, *The Law of Torts,* § 22.2, p. 1201; Prosser, *Law of Torts,* 2nd Ed. § 55. Assumption of risk in its primary and strict sense involves voluntary exposure to an obvious or known danger which negates liability. Under this concept recovery is barred because the plaintiff is assumed to have relieved the defendant of any duty to protect him. *Ibid.*

In Prosser, *Law of Torts,* supra, cited with approval in *Koshorek* v. *Pennsylvania Railroad Company,* supra, the

principles determinative of the distinction are stated as follows: "In working out the distinction, the courts have arrived at the conclusion that assumption of risk is a matter of knowledge of the danger and intelligent acquiescence in it, while contributory negligence is a matter of some fault or departure from the standard of reasonable conduct, however unwilling or protesting the plaintiff may be. The two may co-exist, or either may exist without the other. The difference is frequently one between risks which were in fact known to the plaintiff, or so obvious that he must be taken to have known of them, and risks which he merely might have discovered by the exercise of ordinary care." See also *Potter* v. *Brittan,* supra; *Sullivan* v. *Shell Oil Company,* 234 F. 2d 733, 739 (9th Cir. 1956), cert. den. 352 U. S. 925.

It has been held by the Superior Court of Pennsylvania, an intermediate court of appeals, that contributory negligence is inapposite as a defense in an action for breach of warranty. *Jarnot* v. *Ford Motor Company,* 156 A. 2d 568 (1959). We have found, and the parties to this appeal have cited, no other case in point. We are therefore obliged to follow this decision in the absence of persuasive evidence that the highest court of the State would reach a different conclusion. *McLouth Steel Corp.* v. *Mesta Machine Co.,* 214 F. 2d 608, 610 (3rd Cir. 1954), cert. den. 348 U. S. 873; *St. Clair* v. *Eastern Airlines, Inc.,* 302 F. 2d 477 (2nd Cir. 1962).

The rule as announced by the Superior Court appears to represent the majority view and is supported by substantial authority in other jurisdictions. *Green* v. *American Tobacco Co.,* 325 F. 2d 673, 679 (5th Cir. 1963), cert. den. 377 U. S. 943; *Brown* v. *Chapman,* 304 F. 2d 149, 163 (9th Cir. 1962); *Hansen* v. *Firestone Tire and Rubber Company,* 276 F. 2d 254, 258 (6th Cir. 1960); see also Frumer and Friedman, supra, § 16.01[3]. It was held in the cited cases that in an action for personal injury, predicated on breach of warranty, the defense of contributory

negligence is inapposite. There are other decisons to the same effect. It seems reasonable to assume that the highest court of Pennsylvania would reach the same conclusion.

We are of the view, and so hold, that since contributory negligence is not available as a defense in an action for personal injury based on breach of warranty, assumption of risk in the sense of contributory negligence is likewise not available. However, if a consumer uses a product for a purpose not intended by the manufacturer and suffers an injury as a result, he may not recover because such misuse is beyond the scope of the warranty. See Frumer and Friedman, supra, § 16.01[3]. This was in essence the holding of this Court in *Mannsz* v. *Macwhyte Co.*, supra.

It is the law of Pennsylvania that a person who voluntarily exposes himself to a danger of which he has knowledge, or has had notice, assumes the attendant risk. He may not recover for personal injuries sustained as the result of the exposure because under the circumstances the person responsible for the danger is relieved of any duty to protect the injured person. *Kopp* v. *R. S. Noonan, Inc.*, 123 A. 2d 429 (1956); *Cutler* v. *Peck Lumber Mfg. Co.*, 37 A. 2d 739 (1944). It is clear from these cases that assumption of risk, in its primary and strict sense, is available as a defense in an action for personal injuries based upon negligence. It follows as a matter of logic that the same defense is apposite in an action based on breach of express warranty.

The defense of assumption of risk rested solely on the testimony of the plaintiff which, viewed in the light most favorable to the defendant, was clearly insufficient. There was no evidence upon which the jury could have predicated a determination that the plaintiff either knew or had notice of the harmful effects of Chesterfields. Absent such evidence, the defense of assumption of risk failed.

There was overwhelming evidence that many of the defendant's advertisements carried factual affirmations, professedly based on medical research, that Chesterfields were

safe and smoking them could have no adverse effect on "the nose, throat and accessory organs." These advertisements were calculated to overcome any fears the potential consumers might have had as to the harmful effects of cigarettes, and particularly Chesterfields. Under the circumstances it is difficult to perceive how the plaintiff, a cabinetmaker with no scientific background, could have been charged with notice or knowledge of a danger, which the defendant, with its professed superior knowledge, extensively advertised did not exist. We should emphasize that the medical researchers engaged by the defendant in 1952, apparently failed to detect the danger.

As hereinabove noted, assumption of risk was apposite as a defense in the action based upon breach of express warranty but only in its primary sense. However, the issue raised by the defense was submitted to the jury on general instructions which were inadequate and confusing in that they failed to differentiate between the primary and secondary concepts; in the instructions these concepts were treated as equivalent. Absent such a differentiation, the instructions as given did not correctly relate the law to the issue and were therefore erroneous. *Atkinson* v. *Roth,* 297 F. 2d 570, 574 (3rd Cir. 1962); *McNello* v. *John B. Kelly, Inc.,* 283 F. 2d 96, 101, 102 (3rd Cir. 1960). It was also error to submit the issue to the jury in the absence of evidence to support the defense. *Morran* v. *Pennsylvania Railroad Company,* 321 F. 2d 402 (3rd Cir. 1963); *O'Neill* v. *Reading Company,* 306 F. 2d 204 (3rd Cir. 1962); *Smith* v. *Ellerman Lines,* 247 F. 2d 761, 766 (3rd Cir. 1957).

Arguments in Support of Affirmance

The defendant urges two principal grounds for affirmance and against reversal of the judgment. Preliminarily to our discussion of these grounds it should be stated that the trial errors in this case are attributable, at least in part, to the ineptness of plaintiff's counsel. He made no objections to the Court's instructions or the interrogatories on which the issues were submitted to the jury.

The defendant argues that the plaintiff here advances in support of reversal a theory different from that on which the case was tried and submitted to the jury. This argument has no support in the record. The plaintiff alleged the defendant's breach of warranty as one basis of liability. The issues tried and submitted to the jury were those raised in the denial of the allegation and the defense of assumption of risk. Reversal of the judgment is sought solely on the grounds that the court below committed error in the course of the trial. This is clearly not a case in which there has been a change of theory.

The defendant argues also that since the plaintiff interposed no objection to either the court's instructions or the interrogatories submitted to the jury, the questions raised on this appeal should not be considered. It is the general rule that the appellate court will not consider trial errors to which no timely objection has been made. The rule is not inexorable and is subject to exception. *Hormel* v. *Helvering,* 312 U. S. 552, 557, 558; *Mazer* v. *Lipschutz,* 327 F. 2d 42, 52 (3rd Cir. 1964); *McNello* v. *John B. Kelly, Inc.,* supra; *Callwood* v. *Callwood,* 233 F. 2d 784, 788 (3rd Cir. 1956). Where it is apparent on the face of the record that a miscarriage of justice may have resulted from counsel's failure to properly protect the interest of his client by timely objection, the error must be noticed and rectified. *Ibid.* Since the errors in the trial of this case were fundamental and highly prejudicial, this exception to the general rule is applicable.

Judges Ganey and Freedman concur in the result in this case and in that portion of the opinion which deals with the defense of assumption of risk. The majority view on the question of reliance is discussed in the opinion of Judge Freedman, in which Judge Ganey joins.

The judgment of the court below will be reversed and the action will be remanded with the direction that a new trial be had.

Opinion by Judge Freedman, concurring.

I concur in the reversal of the judgment and the award of a new trial. I believe a new trial is required because the charge of the court did not adequately instruct the jury on the requirements of § 12 of the Sales Act of May 19, 1915, P. L. 543 (69 Purdon's Pa. Stat. Annot. § 121), which applies to this action, although it has since been superseded by the Uniform Commercial Code (Act of April 6, 1953, P. L. 3, § 2-313, 12A Purdon's Pa. Stat. Annot. § 2-313).

In the first place, the charge is inadequate because it gave the jury no explanation of the meaning of § 12 of the Sales Act as it applied to the facts in the case which the jury was called upon to decide. An academic recitation of the language of a statute without any direction as to how it may be applied to the disputed facts before the jury is too general to furnish adequate guidance to them. *McNello* v. *John B. Kelly, Inc.*, 283 F. 2d 96 (3 Cir. 1960). Yet it was on this basis that the court submitted to the jury, which answered "No", Interrogatory No. 5: "Did the defendant make any express warranties upon which the plaintiff relied and by which he was induced to purchase Chesterfield cigarettes?"

The charge was defective not only for vagueness but also because of another error. It instructed the jury that they could not find an express warranty unless the seller "actually intended to be bound by his statement."[1] Such a requirement is contrary to the law of Pennsylvania since the adoption of the Sales Act of 1915 by which Pennsylvania departed from its previous adherence to the English rule. See 1 *Williston on Sales* (Rev. Ed. 1948), §§ 198-200; cf. *Rothermel* v. *Phillips*, 292 Pa. 371, 375-76 (1928). The true test is not whether the seller actually intended to be bound by his statement but rather whether he made an affirmation of fact the natural tendency of which was to induce the sale and which did in fact induce it. Act of May 19, 1915, P. L. 543, § 12, 69 Purdon's Pa. Stat. Annot. § 121; 1 *Williston on Sales* (Rev. Ed. 1948), § 199.

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[1] R. 165a.

Although thus joining in the order of reversal and remand for new trial, I believe it would be erroneous to retry the case on the supposed principle that reliance by the buyer on an express warranty is not required under § 12 of the Pennsylvania Sales Act. The opinion of Judge Smith, which is the opinion of the Court on all other questions in the case, would eliminate the requirement of reliance and thus makes irrelevant the jury's finding that no reliance in fact existed.[2] Its support for this unusual conclusion, admittedly contrary to the general interpretation of § 12 of the Uniform Sales Act, is a difference in punctuation between the section proposed by the Commissioners on Uniform State Laws and the Pennsylvania statute. Section 12 of the Uniform Sales Act, as it was adopted by the Commissioners (See 1 *Uniform Laws Annot.* (1950), p. 173; 1 *Williston on Sales* (Rev. Ed. 1948), § 194) reads as follows: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty." The same section as it appears in the Pennsylvania pamphlet law reads precisely the same except for punctuation; there is no period after the word "thereon" and there is a comma after "seller's opinion only". The punctuation of the Uniform Sales Act, as the main opinion points out, makes it clear that the phrase dealing with reliance modifies the antecedent clause relating to express warranty and that the remaining clause deals with a separate matter, i. e., that no affirmation of value or statement of the seller's opinion shall be construed as a warranty. But because of the absence of the period in the Pennsylvania version the main opinion infers an intention that the

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[2] Although Interrogatory No. 5 contained two questions, i.e., did the defendant make an express warranty and did the plaintiff rely upon it, I shall assume that the jury's negative answer may be applied to both questions.

reliance provision be deemed a part of the remaining clause, so that it would read: "and if the buyer purchases the goods relying thereon no affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only, shall be construed as a warranty." This to my mind makes the reliance provision of the section meaningless. For it is redundant to speak of reliance in regard to statements of value or opinion when they are themselves not to be considered as warranties. If such a construction would mean only that an affirmation of value or a statement of the seller's opinion shall not be construed as a warranty even if the buyer purchases the goods relying thereon, it would be an emphatic statement of the unnecessary. Moreover, it might well be argued from such a construction that such affirmations of value or statements of opinion can be construed as warranties if the buyer purchases the goods without relying on them. Reliance would take affirmations of value or statements of the seller's opinion outside the circle of warranty but non-reliance would bring them in. This is the opposite of what would normally be intended, i.e., that where there is only an affirmation of value or a statement of opinion there can be no warranty irrespective of any reliance. So it has been held in Pennsylvania. *Rothermel* v. *Phillips*, 292 Pa. 371, 375-76 (1928).

Section 12 of the Pennsylvania Act contains the same words as the Uniform Act. It can hardly be supposed that an intention to make such an important change in the Uniform Act on its adoption in Pennsylvania would not have been expressed in some change in language rather than in punctuation. Especially is this true in Pennsylvania, where the practice for many years has been to print bills without any punctuation and to leave it to the office of the Secretary of the Commonwealth to insert punctuation after the bill has been enacted.[3] The bill as it was

[3] See Act of April 9, 1929, P.L. 177, § 804, 71 Purdon's Pa. Stat. Annot. § 274. See also Act of May 4, 1905, P.L. 384, since repealed by Act of June 7, 1923, P.L. 498, § 2901.

adopted by the Legislature was without punctuation, and in accordance with the legislative practice § 12 contained no period or commas.[4] Since the language of the statute is identical with the Uniform Act and was unpunctuated at the time the statute was adopted it should be construed to have the same meaning as the Uniform Act. To arrive at a different and strange construction solely because of the absence of a period is to raise punctuation above its true significance and exalt a clerical act to an exercise of law-making power. It is established in Pennsylvania as a result of the legislative practice that punctuation cannot be relied upon in ascertaining the meaning of a statute. Thus in *Wilson* v. *Wilson,* 126 Pa. Super. 423 (1937), the question arose whether sterility or incapacity to procreate was a ground for divorce. The causes for divorce in Pennsylvania had been laid down in the early Acts of September 19, 1785, 2 Sm. Laws 343, 12 Pa. Stat. at L. 94, § 2, and March 13, 1815, P.L. 150, 6 Sm. Laws 286, § 1. Both of these early statutes authorized divorce from a party who "at the time of the contract, was and still is naturally impotent or incapable of procreation." In the codification of the divorce laws of the Commonwealth in The Divorce Law of May 2, 1929, P.L. 1237, § 10(1), 23 Purdon's Pa. Stat. Annot. § 10, this language was repeated without change, but a comma was inserted before the phrase "or incapable of procreation". Plaintiff pointed to the comma in support of his contention that sterility was a ground for divorce separate from impotence. The court, rejecting this argument, said (p. 426): "It is of no importance that the present Act has added a comma after the word 'impotent'. 'There is no punctuation in a statute, which ought to rule:' *Gyger's Estate,* 65 Pa. 311, 312." The *Wilson* case was not an aberrant decision but followed a principle which a few months later the Legislature itself expressed in the Statutory Construction Act of May 28, 1937, P.L. 1019, § 53,

[4] See 1915 Legislative Journal—House, pp. 3210, 3220, reprinting the bill on final passage.

46 Purdon's Pa. Stat. Annot. § 553: "In no case shall the punctuation of a law control or affect the intention of the Legislature in the enactment thereof." Later, in *Kuntz* v. *Alliance Sand Co.*, 156 Pa. Super. 563 (1945), in rejecting an argument that the meaning of the statute be based on the absence of a comma, Reno, J., a former Attorney General of Pennsylvania, said: "The short and complete answer to the argument is that no significance attaches to the punctuation of a statute. The legislature does not enact the punctuation which appears in the printed statutes. Bills introduced in the legislature may contain punctuation marks but they are entirely deleted by the printer. The printed bills which the legislature considers and passes and the Governor approves are totally devoid of punctuation marks. They are inserted later in the office of the Secretary of the Commonwealth when copies of the laws are prepared for the printer of the Pamphlet Laws, but they have no legislative sanction. For these reasons the legislature has expressly commanded that its intention shall not be controlled or affected by the punctuation [citations]. Reading the cited section, without punctuation, as it left the legislature and the Governor . . . [the court construed the statute]". (pp. 565-66).

The well established Pennsylvania practice which was later cast in the form of a statutory command is not weakened because of a stray decision running the other way. For if the meaning of legislation is to be affected by punctuation, the official who punctuates the bill would be engaged in a legislative act and the Legislature would be held to have delegated legislative power to the executive in violation of the Pennsylvania Constitution.[5] Pennsyl-

[5] See the interesting commentary by Schulz and Stahl on "The Enactment and Construction of Statutes in Pennsylvania", 46 Purdon's Pa. Stat. Annot., pp. 1, 30-1. The one or two cases running the other way are distinguished by the authors as "sports" and their statement why such views are erroneous is unanswerable: "[B]ills in the General Assembly are not punctuated, the periods and commas

vania's legislative practice may well appear to be outmoded and the principle on which it is based—that the language of a bill should be so clear that no punctuation is necessary to aid in the expression of its meaning—may well be an unattainable ideal.[6] But we may not ascribe to the statute

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and other marks being inserted after the enactment by the Secretary of the Commonwealth. . . .

"The thought behind the unpunctuated bill is reputedly that the wording by itself should be so clear as to leave no doubt as to meaning which needs to be cleared up or changed by punctuation. If the sense is inserted or changed by the punctuation, the officer who punctuates the bill is actually legislating, contrary to the provisions of the Pennsylvania Constitution assigning the legislative power to the General Assembly." (p. 30).

For this reason the statement in Yeager Unemployment Compensation Case, 196 Pa. Super. 162 (1961) must be regarded as ill-considered dictum. See also the dissent in that case by Judge Flood at pp. 173-180, especially Note 1.

[6] The effect of punctuation on meaning and how precision in language may minimize the need for punctuation are interestingly illustrated in DeVinne, The Practice of Typography: Correct Composition (1901), pp. 241, et seq., and Brossard, Punctuation of Statutes, 24 Oregon L. Rev. 157 (1945).

DeVinne, who has been very influential because he supervised the publishing of the Century Dictionary and Cyclopedia, states: "Rules are of value, whether they are found in grammars or are taught by proof-readers, but they can never take the place of an understanding of subject-matter. . . . Here is an illustration—a short sentence which can be made to convey contrary meanings by the insertion or omission of two commas.

"The prisoner said the witness was a convicted thief.

"The prisoner, said the witness, was a convicted thief." (p. 260).

Brossard, whose article was submitted as a report to the National Conference of Commissioners on Uniform State Laws, of which he was a member, shows how this sentence might properly have been written so that its meaning would not be altered by punctuation: "That sentence would not depend on points if it were reconstructed thus: 'The prisoner said that the witness was a convicted thief' or 'The witness said that the prisoner was a convicted thief.' Similar examples of bad syntax have been used to prove that meaning may hang on a comma. Here is one: 'Woman, without her, man would be a savage.' 'Woman, without her man, would be a savage.' Or take this schoolboy riddle: 'Would you rather a lion eat you, or a tiger?' The comma is relied on to keep the lion from eating the tiger. Those are mere plays on words. Word juggling may be indulged in for amusement; but a statute is no place to 'conjure with us in a double sense'." (p. 170).

an intention derived from some other practice, one which the Legislature has not adopted.

We recognized and applied the Pennsylvania practice in construing a Pennsylvania statute in *In Re Industrial Sapphire Mfg. Co.*, 182 F. 2d 589 (3 Cir. 1950), where Judge Goodrich said: "Once we are freed from the commas the statute, we think presents no difficulty and we give it the construction we think is the natural one." (p. 591).

I think § 12 of the Pennsylvania Sales Act should also receive a natural and sensible construction, one which its draftsman—who was Professor Williston and not the Pennsylvania Legislature—obviously intended. An intention so clearly and authoritatively written should not be uprooted and rendered meaningless by the subordinate element of punctuation, especially when it is irrelevant.

For half a century the courts of Pennsylvania have indicated without any apparent suspicion of doubt that § 12 of the Sales Act of 1915 requires reliance on an express warranty. They have quoted the statute in a form which assumes that the last clause is a separate sentence and that the provision regarding reliance modifies the preceding language dealing with express warranty rather than the subsequent clause that an affirmation of value and a statement of seller's opinion alone do not constitute a warranty. Illustrations of this will be found in *Butcher* v. *Newburger*, 318 Pa. 547, 552 (1935), where the phrase on reliance is quoted as part of the description of express warranty and where if reliance were legally unnecessary much of the court's discussion would have been irrelevant. In *C. D. Brown & Co., Inc.* v. *Standard Hide Co.*, 301 Pa. 543, 548 (1930), the court quoted the first part of § 12 as qualified by the requirement of reliance and then went on to say that a statement of value is excepted from the rule. In *Yonker* v. *Vaneer*, 91 Pa. Super. 157, 161 (1927), a charge requiring actual inducement was approved. See also *Pantano* v. *Zamer Motor Sales Co.*, 170 Pa. Super. 317, 323 (1952), to the effect that there was no right of action for breach of

warranty where the buyer relied on its own inspection rather than the warrantor's statement. Professor Williston, reviewing the changes effected in Pennsylvania by the Sales Act of 1915, concludes: "Although the effect of old decisions is hard to obliterate, the plain words of the Sales Act must override them, and it has ultimately been recognized that sufficient essentials of a warranty exist where there is an affirmation, the tendency of which is to induce the sale *and which does induce it.*" 1 *Williston on Sales* (Rev. Ed. 1948), § 199, p. 512. (Emphasis added).[7]

In addition to the frequent instances in which the Pennsylvania courts have drawn the reliance phrase into the preceding portion of § 12 dealing with warranty, there are cases which show the necessary complement that the provision that affirmations of value or a statement of seller's opinion are not to be construed as a warranty is complete in itself and separate from the reliance clause. This is strikingly shown in *Rothermel* v. *Phillips,* 292 Pa. 371, 375-76 (1928), where Mr. Justice Sadler quoted § 12

[7] A contemporary expression of the understanding of § 12 of the Pennsylvania Sales Act is found in the discussion of § 2-313 of the Uniform Commercial Code. The Pennsylvania Bar Association's notes to the section state in regard to subsection (1)(a) dealing with express warranty: "Under the Code, the qualification that affirmations, etc. create a warranty if made 'as a basis of' the bargain, appears to be substantially the same as the 'reliance' qualification in § 12 of the Uniform Sales Act, 69 P.S. § 121, (repealed)." In discussing Subsection (2), dealing with affirmations of value or statements of seller's opinion, the Bar Association's note states: "The qualification as to statements of 'value' rephrases but does not appear materially to change § 12 of the Uniform Sales Act, 69 P.S. § 121 (repealed).": 12A Purdon's Pa. Stat. Annot., p. 162. Similarly, see the Report of the Subcommittee on the Proposed Uniform Commercial Code of the Joint State Government Commission of the Pennsylvania General Assembly (1952), p. 23.

The comment by the drafters of the Uniform Commercial Code confirms this view. They make it clear that what was formerly described as reliance is now absorbed as a factor which is made a basis of the bargain. Comment 3 to § 2-313 states that where a statement is made *during a bargain* no particular evidence of reliance need be shown, but that it remains a question of fact whether evidence introduced by the defendant is sufficient to show non-reliance.

of the Pennsylvania Sales Act in two parts; in the first part quoting the language dealing with affirmations of fact or promises by the seller he included the clause relating to the buyer's reliance, but he excluded it in quoting the clause that affirmations of value or statements of the seller's opinion alone are not to be construed as a warranty. The case was then explicitly decided on the second clause of § 12.

It is clear, therefore, that the conclusion of the main opinion constitutes a wide departure from the settled view in Pennsylvania that § 12 of its Sales Act is the same as the Uniform Act, and creates an unwarranted gulf between the Pennsylvania Sales Act and the equivalent provision of the Commercial Code.

Reliance is a question of fact. In the language of the Sales Act the question is whether the buyer relied on an affirmation of fact or promise by the seller. The main opinion would remove this factual question and instead make the test under the Pennsylvania Sales Act whether the factual affirmation or promise had the natural tendency to induce the buyer to purchase the goods. Natural tendency to induce is not the same as actual reliance. It may be that in many cases the circumstances which will indicate the natural tendency to induce the buyer to purchase the goods will also be enough to show reliance. But this element of fact which is ever present should not be withdrawn from determination by the jury.

I do not consider that our decision in *Mannsz* v. *Macwhyte Co.*, 155 F. 2d 445 (3 Cir. 1946), stands in the way. There the injured plaintiff sued the manufacturer of wire rope for negligence and breach of express warranty. We sustained the dismissal of the action because of plaintiff's failure to prove either negligence in the manufacture of the rope or its inadequacy for its intended use. In the course of the opinion it was said that in *Henderson* v. *National Drug Co.*, 343 Pa. 601 (1942), Pennsylvania had adopted the principle of *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382 (1916), that privity was not required in a

suit for negligence. The opinion then went on to state that the abolition of privity extended also to actions for breach of warranty and indicated that reliance on the representations was unnecessary. This statement, which went beyond the necessities of decision, was unsupported at the time. Since then the Supreme Court of Pennsylvania, while reiterating the view that privity is no longer required in an action for negligence, has emphatically declared that the privity requirement retains a definite vitality in suits for express warranty. The reason for this has been stated to be that a defendant should not be held to be a guarantor of his product in cases where liability should rest on negligence. The Court has been strict in maintaining that one who is not a purchaser may not maintain a claim of breach of warranty where there is an absence of privity, although it has extended the concept of purchaser to include, in addition to the immediate purchaser, the subpurchasers along the line from manufacturer to ultimate consumer.[8] Even subsequent purchasers may recover from the original seller only where his express promise may be said to be a part of the consideration for the purchase and is meant to be conveyed to and relied upon by subsequent purchasers. See *Silverman* v. *Samuel Mallinger Co.*, 375 Pa. 422, 428-29 (1953); *Hochgertel* v. *Canada Dry Corp.*, 409 Pa. 610, 616 (1963); *Yentzer* v. *Taylor Wine Company*, 414 Pa. 272 (1964). See also *Driver* v. *F. A. Mitchell Co.*, 35 F.R.D. 226 (E.D.Pa. 1964). In the present Pennsylvania law under the Uniform Commercial Code[9] the element of reliance on the part of the buyer will be absorbed in the determination of the basis of the bargain, but it will remain

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[8] With the adoption of the Uniform Commercial Code in Pennsylvania this rule has necessarily been expanded to include, by virtue of § 2-318 (12A Purdon's Pa. Stat. Annot. § 2-318), one who is in the family or household of the buyer or a guest in the buyer's home if it is reasonable to expect that he may use, consume or be affected by the goods. See Yentzer v. Taylor Wine Company, 414 Pa. 272 (1964).

[9] Section 2-313, 12A Purdon's Pa. Stat. Annot. § 2-313.

a question of fact to be determined by the jury where the seller seeks to show that his affirmation was not a part of the basis of the bargain.

I would hold, therefore, that the issue of reliance is not irrelevant and that whether the factual affirmations in the advertisements were such as would naturally tend to induce the buyer to purchase the goods was not the only issue. On the contrary, in my view it was necessary for the plaintiff to show that affirmations of fact relating to the goods had a natural tendency to induce the buyer to purchase the goods and that the buyer purchased the goods relying thereon. The jury could, in my view, have found that these requirements were met under the evidence in this case. They should have been told how the evidence bore on the question of natural tendency to inducement and how that same evidence was relevant to the question of reliance. This the court below did not undertake to do, and this it should do on a retrial.

I am authorized to state that Judge Ganey joins in this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,802

ANITA PRITCHARD, ADMINISTRATRIX OF THE ESTATE OF OTTO E. PRITCHARD, DECEASED,

Appellant,

vs.

LIGGETT & MYERS TOBACCO COMPANY,
A CORPORATION,

(D. C. CIVIL No. 12820)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: GANEY, SMITH and FREEDMAN, *Circuit Judges.*

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court, filed November 9, 1962 and entered November 13, 1962, be, and the same is hereby reversed, with costs, and the action remanded with the direction that a new trial be had.

Attest:

M. ELIZABETH FERGUSON
Deputy Clerk

July 26, 1965

APPENDIX B

Swain v. *Boeing Airplane Co.*, 337 F. 2d 940 (2d Cir. 1964)—decided Oct. 27, 1964.

Batista v. *Weir*, 340 F. 2d 74 (3d Cir. 1965)—decided Jan. 8, 1965.

Jerrold Electronics Corp. v. *Wescoast Broadcasting Co.*, 341 F. 2d 653 (9th Cir. 1965)—decided Jan. 22, 1965.

Waxler v. *Waxler Towing Co.*, 342 F. 2d (6th Cir. 1965)—decided Jan. 29, 1965.

New Orleans and Northeastern R. Co. v. *Hewett Oil Co.*, 341 F. 2d 406 (5th Cir. 1965)—decided Feb. 11, 1965.

Burns v. *Travelers Insurance Co.*, 344 F. 2d 70 (5th Cir. 1965)—decided Apr. 7, 1965.

Stiles v. *Gove*, 345 F. 2d 991 (9th Cir. 1965)—decided May 24, 1965.

Woods v. *National Life and Accident Insurance Co.*, 347 F. 2d 760 (3d Cir. 1965)—decided June 22, 1965.

Jones & Laughlin Steel Corp. v. *Matherne*, 348 F. 2d 394 (5th Cir. 1965)—decided June 25, 1965

United States v. *84.4 Acres of Land, etc.*, 348 F. 2d 117 (3d Cir. 1965)—decided July 14, 1965.

Bern v. *Evans*, 349 F. 2d 282 (8th Cir. 1965)—decided Aug. 3, 1965.

APPENDIX C

(Tr. 3079)

* * * * *

Mr. Eckert: I don't think this was on the record before, so I'd like to put this on the record, if I may.

We respectfully request the court to instruct the jury that assumption of risk might also be based, in addition to the two grounds that the court mentioned in his charge, on the following: First, the plaintiff's testimony that he heard from the time he began to smoke cigarettes that they were coffin nails, and that when a person smoked a cigarette, it was (Tr. 3080) equivalent to driving a nail into his coffin.

Second, the plaintiff's testimony that his wife warned him to reduce his smoking when he was married in 1930, and that he did so.

Third, that the plaintiff testified that at various times when he smoked Chesterfield cigarettes heavily, he got a bad cough, and that then upon his wife's advice, or upon his own accord he would switch away from Chesterfield to some other brand of cigarette, or to a pipe for sometimes perhaps a month or so, two or three times a year, and that when he did so his cough would go away or ease off, but that then sometime later he would resume smoking Chesterfields and go through the same cycle.

Fourth, the fact that Arthur Godfrey in his broadcasts, which are in evidence, said such things as that cigarettes were killing him, and that there were a lot of people in this world with too much sense to smoke them, and other condemnation of cigarettes as being harmful to the smoker's health; and

Fifth, and last, that in Dr. Colwell's history taken on October 15, 1953 which is in evidence, it is stated that the plaintiff had had a chronic cough for the last six or eight months following resumption of the smoking of cigarettes. (Tr. 3081).

Mr. McArdle: It is my understanding—

The Court: That is all on the assumption of risk.

Mr. Eckert: Yes, that all has to do with assumption of risk, your Honor.

Mr. McArdle: Your Honor said in his charge—that except where necessary, he was not going to charge on the evidence. Any evidence that I think your Honor charged, I think perhaps it was necessary, was the testimony that you referred to one of the defendant's witnesses who said he smoked stogies, and of course you said if he only smoked stogies and a pipe, that would be the end of the case. I suppose that is the policy of our Circuit and of this District.

Counsel now wants to discuss evidence. If he wants to discuss evidence, then I would suggest that, your Honor, in this connection would have to do with discussing the addiction and craving of Dr. Ochsner's testimony.

The Court: That is exactly what I don't want to go into, because that is when we will be in trouble if we do all that.

I cited these examples, Mr. Eckert, merely as an example so that the jury would understand what I was talking about when I said "assumption of risk." (Tr. 3082).

Now, those items were all thoroughly covered by you in your closing address yesterday; is that not a fact?

Mr. Eckert: Yes, that's right.

The defendant also respectfully excepts to any additional or supplemental charge such as requested by the plaintiff with respect to negligence because of the publication of any advertisements.

* * * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NO. 691

LIGGETT & MYERS TOBACCO COMPANY,
Petitioner,

v.

ANITA PRITCHARD, Administratrix of the Estate of OTTO E. PRITCHARD, Deceased, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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5 Moore, Federal Practice para. 51.04, pp. 2503-4 (2d ed. 1964)	3
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ANITA PRITCHARD Administratrix of the Estate of OTTO E. PRITCHARD, Deceased, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Questions Presented by petitioner (Pet. 2) do not challenge the ruling below that there was serious error in the instructions on express warranty and on assumption of risk. Though petitioner in its argument takes issue with these rulings (Pet. 15-20), since they are not here raised as error they must be assumed to have been correct. It is therefore petitioner's position that, though the verdict in its favor came from a jury which had been erroneously instructed as to the law, nevertheless the integrity of jury trial and the inexorable language of Rule 51 require that such a verdict must stand. The demand of this litigant for its pound of flesh is hardly one of those "special and important rea-

sons" which, under Rule 19 of this Court, alone justify the grant of certiorari.

The action of the Third Circuit in this case did not emasculate Rule 51, as petitioner suggests. (Pet. 15). It applied the rule in precisely the spirit for which this Court has called.

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

Hormel v. Helvering, 312 U.S. 552, 557 (1941).

The Court expressed a similar view in the passage from *United States v. Atkinson,* 297 U.S. 157, 160 (1936), quoted in the petition. (Pet. 12). Petitioner would distinguish *Atkinson,* which clearly recognizes the possibility of reversal for plain error in a civil case, on the ground that it antedates adoption of Rule 51. Petitioner ignores the fact that this very passage from *Atkinson* was quoted and relied on for decision by this Court in *Silber v. United States,* 370 U.S. 717, 718 (1962).

Petitioner says that if there is a plain error exception to Rule 51 — as this Court has indicated and the courts of appeals repeatedly have held — it is not as broad as it was understood to be by the court below. (Pet. 15). But a leading commentator formulates the

exception in these terms: "* * * the appellate court may in its discretion consider grounds of error in spite of a failure to object below where it is apparent on the face of the record that a miscarriage of justice may occur." 5 Moore, Federal Practice ¶ 51.04, pp. 2503-4 (2d ed. 1964). This is the exact formulation on which the court below relied. (A-11)

The conflicts and confusion which petitioner professes to find in the decisions of the courts of appeals on this question are illusory. It is true that judges and legal writers have used varying terminology in describing the power of the appellate court where plain error has occurred, but petitioner shows no conflicting holdings among the courts of appeals. It instances no case in which a court has affirmed, because of the absence of objection in the trial court, in the face of instructions as erroneous as those given here. Verbal formulations are a matter of style and of taste. Behind the words, all recognize that reversals in the absence of objection should not be common. When holdings are distinguished from dicta, it is apparent that this power has been exercised sparingly and with restraint by the appellate courts. See 2B Barron & Holtzoff, Federal Practice and Procedure § 1106 n. 66.1 (Wright ed. 1961). This has been the policy of the Third Circuit, as of the others. The question whether this particular case was one of those rare cases in which the power should be exercised is hardly the kind of question which merits review here.

Finally, if there were confusion and conflict as to the proper understanding of Rule 51 — and respondent believes there is none — it could not effectively be ended

by a decision here, which would of necessity be confined to the facts of this particular litigation. The cure for this non-existent disease would more appropriately come through the exercise by the Court of its power to amend the rules, in which the Court would have the benefit of recommendations from the Advisory Committee on Civil Rules, the Advisory Committee on Appellate Rules, and the Judicial Conference of the United States. These distinguished bodies, which are charged with continuous examination of the various sets of procedural rules, can study the entire question, obtain the views of the profession, and provide the Court with a broader perspective on the problem than a particular case permits.

For the foregoing reasons, the Court should deny the petition for certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 691

LIGGETT & MYERS TOBACCO COMPANY,
Petitioner,

v.

ANITA PRITCHARD, Administratrix of the Estate of Otto E. Pritchard, Deceased,
Respondent.

PETITIONER'S REPLY BRIEF

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December 16, 1965

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PETITIONER'S REPLY BRIEF

Although dated November 5, 1965, respondent's Brief in Opposition was not served on petitioner's counsel until December 1, 1965. Thus, this Reply Brief is timely.

The first sentence of respondent's Brief in Opposition is inaccurate and misleading and sets the tone of the entire brief. The Questions Presented by Petitioner most certainly do raise the issue that the Court of Appeals was clearly wrong in finding error in the Trial Court's instructions.

Rule 23(c) of this Court's Rules requires the Questions Presented to be stated "without unnecessary detail" and deems presented all subsidiary questions "fairly comprised therein".

Question 2 in the Petition states:

> "2. If a 'plain error' exception is to be engrafted on Rule 51 despite its unambiguous and mandatory language, what are the criteria for the application of such an exception, and is this a proper case for its application?" (p. 2).

Whether this is a "proper case" for application of a "plain error" exception to Rule 51, if one exists, certainly comprises the issue whether there was error at all. As pointed out at pages 15-20 of the Petition, the Third Circuit's holding was clearly erroneous.

The cases respondent cites for support of the Third Circuit's position are completely irrelevant. Petitioner contends that there is no plain error exception to Rule 51, not that plain error does not apply to Federal Civil Trials. See note on p. 13 of Petition. Ignoring that clear statement, respondent attempts to avoid or confuse this clear issue by discussing plain error generally and not with regard to Rule 51. Neither *Hormel* v. *Helvering,* 312 U.S. 552 (1941), nor *Silber* v. *United States,* 370 U.S. 717 (1962), cited by respondent, had anything to do with instructions. In both cases, new substantive theories of law were raised on appeal. As pointed out in the Petition, this Court has refused to consider alleged error in instructions not raised below. See pp. 9-10 of Petition.

Respondent's attempt to show that *United States* v. *Atkinson,* 297 U.S. 157 (1936), has been resurrected in civil cases after adoption of the Federal Rules of Civil Procedure is patently wrong. *Silber* was a criminal case which specifically relied on Rule 52(b) of the

Federal Rules of Criminal Procedure. The discussion at pages 12-14 of the Petition need not be repeated.

Finally, respondent apparently has not read *Woodworkers Tool Works* v. *Byrne,* 191 F.2d 667 (9th Cir. 1951), which is an "instance" where a Court of Appeals affirmed a verdict below despite error in the instructions because no objection was made. Respondent's present assertion that there were glaring errors in the instructions is belied by his complete unawareness of or silence about such alleged errors not only at trial but also on appeal.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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